

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

FREDERICK J. GREDE, not individually but  
as Liquidation Trustee of the Sentinel  
Liquidation Trust,

Plaintiff,

v.

THE BANK OF NEW YORK and THE  
BANK OF NEW YORK MELLON CORP.,

Defendants.

No. 08 C 2582  
Judge James B. Zagel

**ORDER**

The Trustee has proposed that I make new or further findings of fact. I decline to do so.

I have addressed the issue of proposed findings of fact and made clear that the facts found shall not include interpretations of the meaning of the facts. Those interpretations are offered as part of closing argument oral or written. Findings of fact are not the only source of material on which a court or party can base its conclusions of law. The trial record is a very important basis on which arguments and claims can be founded particularly where the party seeking a “finding of fact” also claims that the facts in question are not in dispute. Where certain facts are not in dispute there is no real value in designating them in a numbered paragraph as special in some way. Relevant facts are relevant facts whether or not they appear in a finding of fact or in an un rebutted transcript.

A very large percentage of the proposed findings of fact offered by the Trustee fall, according to the Trustee, in the category of material that is not rebutted (i.e. not responded to) or

contested.<sup>1</sup> Other proposed findings of fact are simply requests that I declare certain testimony to be a “finding of fact.”<sup>2</sup> The only fact claimed is that certain testimony was given in answer to a certain question. It is an undisputed fact that a witness uttered certain words. The fact of the utterance itself is not the kind of fact that is in dispute. What the trustee seeks is the value of judicial typographical emphasis useful in the rhetoric of advocacy.

There are a few other Trustee requested findings of fact. Number 1 is the proposition that “BONY had actual knowledge that Sentinel was required to hold its customer funds in segregation and could not pledge those funds to secure its loan with BONY.” There is too much ambiguity in the statement about the scope of its “actual knowledge” respecting what is or is not segregated consumer funds or assets at any given period of time. Number 7 refers to the content of a Sentinel website and asserts that the witness Law “looked” at the website which is not enough information to reach a conclusion of what Law saw and understood. Number 21 is not a finding but a recitation of possible red flags raised by Trustee. Number 24 is a description of the testimony of one witness taken from the record, it “underlines” the testimony of a witness. The testimony itself is not a fact, but evidence of what might be found to be a fact. Number 26 refers to my determination that certain documents would put BNYM on notice (if and only if) the objective standard of notice was the correct guide. I found that the subjective standard was appropriate and, nevertheless, Number 26 is a hypothetical observation that should not be considered a finding of fact. The request that Number 34 be deemed a finding of fact is a straight forward attempt to elevate a comment on one piece of evidence (a comment which the Trustee favors) into a “finding of fact.” Doing so does not elevate the significance of my observation nor

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<sup>1</sup> With the exception of certain proposals the vast majority of proposed statement of fact excerpts from the record that Trustee deems to be unrebutted or agreed facts. These are numbers 2-6, 8-20, 22-23, 25, 27-33, 35-45

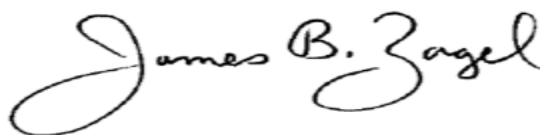
<sup>2</sup> Numbers 42-45 are examples.

does it diminish its significance. It counts in the same way whether or not it is formally designated as a finding of fact.

The dividing line between finding of fact and conclusion of law is not strictly defined. Some conclusions of law are reasoned accounts of elements of law in the context of the facts of the case. Some findings of fact cannot be understood without conclusions of law. Opinions which present separate sections of findings of fact and conclusions of law usually recite, as I did here, the formula that recognizes that some findings of fact appear in the law section and some law appears in the fact section and each should be recognized for what it is no matter in which section it is found. There is no requirement that a finding of fact must be formally designated or lose its standing as an accepted fact. Even in the most elaborate use of formal findings, the reader will recognize judicially accepted proven fact despite the absence of a label.

There is no just reason to enter any of the proposed supplemental findings of fact. I see no reason to depart from my original order which permitted the agreed statement of facts and instructed the parties to refrain from using the statements as a platform to debate questions of interpretation.

ENTER:

A handwritten signature in black ink that reads "James B. Zagel". The signature is written in a cursive, flowing style with a large initial "J" and a prominent "Z".

James B. Zagel

United States District Judge

DATE: December 12, 2014